BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;AND IN THE MATTER OF the complaint by Mark A. Jeppesen dated March 3, 1998, alleging discrimination in employment on the basis of handicap.

B E T W E E N:

Ontario Human Rights Commission

-and-

Mark A. Jeppesen

Complainant

- and -

Corporation of the Town of Ancaster, Fire and Emergency Services; David Guilbault

Respondents

Ancaster Professional Fire Fighters' Association

Intervenor

DECISION

Adjudicator: Mark Sandler

Date: January 2, 2001

Board File No: BI-0288-99

Decision No: 01-001

Board of Inquiry (*Human Rights Code*)
505 University Avenue,
506 2nd Floor, Toronto ON M5G 2P3
Phone (416) 314-0004 Toll free 1-800-668-3946 Fax: (416) 314-8743

APPEARANCES

Ontario Human Rights Commission	)	Jennifer Scott
Mark Jeppesen, *Complainant*	)	
Corporation of the Town of Ancaster Fire and Emergency Services, and Chief David Guilbault, *Respondent*	)	Lee A. Pinelli, Counsel
Ancaster Professional Fire Fighters' Association, Local 2592 IAFF, *Intervenor*	)	Kim Buchanan , Counsel

INTRODUCTION

This is a complaint by Mark A. Jeppesen that his right to equal treatment with respect to employment without discrimination because of handicap was infringed by the Respondents, the Corporation of the Town of Ancaster, Fire and Emergency Services ("the Service") and David Guilbault in contravention of sections 5(1) and 9 of the Ontario *Human Rights Code* ("the *Code*").

In January 1988, Mark Jeppesen began to serve as a part-time or voluntary firefighter with the Service. His dream was to become a full-time firefighter with the Service and he worked hard to attain that goal. There was every reason to believe that his dream would be realized. After all, he was well regarded by the Service and performed his duties for almost a decade with distinction.

In June 1997, Mr. Jeppesen applied for full-time employment with the Service when positions became available. He was well qualified as a firefighter. However, visual impairment due to an illness legally disqualified him from operating the town ambulance, a duty also performed by the Service's full-time firefighters. As a result, he was denied employment. As further positions became available in 1997 and 1998, he sought accommodation from the Respondents but was unsuccessful.

This case concerns the requirement imposed by the Respondents that all applicants for full-time employment had to be legally qualified to drive an ambulance.

For the reasons that follow, I find that the Respondents discriminated against Mr. Jeppesen on the basis of disability. They failed to accommodate him by permitting him to perform firefighting and fire prevention duties only, when they were able to do so without incurring undue hardship. They thereby infringed his rights under the *Code*.

THE HISTORY OF THIS PROCEEDING

The Board of Inquiry ("the Board") received this complaint on November 22, 1999. The first day of hearing was conducted by conference call on December 20, 1999. On September 7, 8 and 9, 2000, evidence was heard. Written and oral submissions later followed.

The Ontario Human Rights Commission ("the Commission") assumed carriage of the complaint. Mr. Jeppesen was unrepresented, but participated fully in the hearing by cross-examining witnesses tendered by the Respondents and by making submissions on various issues as they arose.

Mr. Jeppesen also testified in support of the complaint. Three witnesses were tendered in support of the Respondents' case: David Guilbault, himself a Respondent and former Chief of the Service, Mark Mehlenbacher, his Deputy Chief and then his successor[1], and Harry Olivieri, currently a Captain with the Service. Mehlenbacher and Olivieri had risen through the Service's ranks as firefighters. As well, the parties prepared a brief of relevant documents, marked as Exhibit 3 in this proceeding. One additional document, the 1998 Shift Schedule, was introduced through the witnesses and marked as Exhibit 4.

With the approval of all parties, I bifurcated the proceedings. As a result, I have received written and oral submissions on the "infringement" issue only. I directed that a further hearing on the issue of "remedy" would be scheduled, if required.

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[1]Mark Mehlenbacher is generally referred to as Deputy Chief Mehlenbacher unless the context otherwise requires.

During the hearing, it came to my attention that the Ancaster Professional Fire Fighters' Association, Local 2592 IAFF ("the Association") was the bargaining agent for full-time firefighters employed by the Corporation of the Town of Ancaster. On September 7, I directed that formal notice of hearing be given to the Association to permit it to decide whether it wished to seek leave to intervene in this matter. I was of the view that the subject matter of this complaint might affect the rights and interests of the members of the Association and the terms and conditions of the collective agreement between the Association and the Town of Ancaster. My concern was largely prompted by the fact that the Commission was requesting an order, as part of the remedy in this case, that an accommodation policy be adopted for the Service.

In response to the Notice of Hearing, the Association filed written submissions in accordance with Rules 16 and 17 of this Board's *Rules of Practice* indicating its intention to seek leave to intervene on the issue of remedy only. On September 15, 2000, I reconvened to hear oral submissions on that issue.

The Commission opposed the application. Its position was that any intervention by the Association would be unhelpful. If an infringement were established, the Commission would not be requesting that the Board articulate, in any detail, the content of any accommodation policy. Accordingly, the Association's involvement would be more appropriate in the development of such a policy than in making submissions before the Board. The Commission also noted that the Service no longer provides ambulance services. (As noted above, the complainant's incapacity to operate an ambulance is central to this case.) This was said to further limit the Association's interest in this proceeding.

The Respondents did not oppose the application.

At the end of submissions, I granted the Association's application for leave to intervene to make oral and written submissions confined to the issue of remedy and, more particularly, to

the terms of any order directing the development of an accommodation policy for the Service. Some elaboration upon my order follows.

RULING ON THE ASSOCIATION'S INTERVENTION

Rule 18 of the Board's *Rules of Practice* provides that the right of persons to participate or intervene may be full or partial, may relate to all or part of the proceeding, and may be limited to written submissions as the panel considers appropriate.

The rule does not speak to the factors that should inform whether an application for participation or intervention should be granted and, if so, on what terms.

The intervention sought here was not as an added *party*. An intervenor as an added party is usually afforded all the rights and liabilities as possessed by the original parties to the proceeding. Sections 38(2) and 38(3) of the *Code* set out the parties to a proceeding before the Board and confer limited jurisdiction upon the Board to add such parties. Since there has been no allegation that the Association infringed Mr. Jeppesen's rights, there was no basis for adding the Association as a party to this proceeding.

Instead, the intervention sought here has been described as that of an *amicus curiae* or friend of the court. The interests of *amicus curiae* greatly vary. For example, they may be individuals or groups that have a significant interest in the effect of a decision upon public policy and the public's rights. They often bring to a proceeding expertise or experience in the subject matter of that proceeding. On the other hand, *amicus curiae* may have a significant interest in the effect of a decision upon their own rights. Of course, some *amicus curiae* may combine both kinds of interests.

In my view, the following considerations, while not exhaustive, inform the decision whether intervention should be granted and, if so, on what terms:

(a) whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding;[2]

(b) whether the applicant has a significant interest in the issue on which intervention is sought;

(c) whether the applicant is likely to provide assistance to the Board that will not otherwise be provided.

I have applied these considerations to the Association's application.

There can be no suggestion that the Association's intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding. Indeed, the Association has not requested to be heard, unless and until an infringement under the *Code* has been found. As well, the Association has no interest in making submissions on any aspects of the remedy sought other than any order pertaining to an accommodation policy.

I am satisfied that the Association has a significant interest in the content of any accommodation policy to be developed for the Service. The search for accommodation is a multi-party inquiry. A union owes a duty to accommodate, short of undue hardship, jointly with the employer and any failure on the union's part to facilitate accommodation may attract liability: *Central Okanagan School District No. 23 et al. v. Renaud et al. ("Renaud")* (1992), 95 D.L.R. (4th) 577 (S.C.C.) Despite the changes that have since occurred to the services provided by the Town of Ancaster, development of an accommodation policy may well affect the existing or any future collective agreement between the Association and the Service. Further, the Association has a duty of fair representation to its employees who allege that they have not been accommodated by their employer: *Canadian Merchant Service Guild v. Gagnon et al.* (1984), 9

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[2]This consideration is explicitly recognized in Rule 13.02(2) of the Ontario *Rules of Civil Procedure*. Those rules are helpful though they are not binding upon the Board.

D.L.R. (4th) 641 (S.C.C.).

In my view, it follows that the Association also has a significant interest in the terms of any order made pertaining to such an accommodation policy. It became obvious during oral submissions that a divergence of opinion exists as to what the terms of any such order should be. The Association submitted that it would welcome adoption of an accommodation policy, provided that the Board directs that the Association must consent to its content. The Service submitted (without prejudice to its position that no infringement has been shown in this case) that any accommodation policy should be developed jointly with interested parties, but that the Association cannot insist upon a "veto." The Commission may request that any order direct that any accommodation policy be vetted or even approved by it. All of the parties and the Association have a significant interest in the terms of such an order and will be of obvious assistance to the Board in structuring such an order, if required.

These reasons should not be taken to mean that an applicant, similarly situated, should not be granted leave to intervene on the issue of infringement. Such intervention was not requested here.

THE FACTS

The Nature and Structure of the Service

In June 1997, a notice was posted that the Town of Ancaster Fire Department required "two full time firefighters." This was an internal posting available only to employees of the Town of Ancaster. The notice spelled out the duties and qualifications required of the successful applicants. These duties were largely related to firefighting and fire prevention, but included "additional tasks and related work as assigned e.g. ambulance duties." The qualifications again were largely related to firefighting and fire prevention, but included statutory preconditions to the operation of an ambulance, most particularly, the possession of a valid and subsisting class F

driver's licence.

At the material time, the Town of Ancaster Fire and Emergency Service was a "composite service": that is, it was staffed by full-time and part-time firefighters.[3]

Pursuant to a contract between the Town of Ancaster and the provincial Ministry of Health, the Service also provided a full-time ambulance service. The terms of this contract provided, amongst other things, that the town's ambulance be staffed 24 hours a day by two employees dedicated only to the ambulance. This meant that the town's full-time firefighters were obligated to staff the ambulance. This arrangement was unique in Ontario. In furtherance of this contract, the Ministry of Health funded the equivalent of six full-time firefighters' salaries.

As a result of this contractual arrangement, eight full-time firefighters were dedicated to ambulance duties only. Four crews of two firefighters per crew were assigned to the ambulance. These ambulance crews were assigned to two shifts: a 10 hour day shift (8:00 a.m. to 6:00 p.m.) and a 14 hour night shift (6:00 p.m. to 8:00 a.m.), four days on and four days off. During any 24 hour period, two crews were assigned to the ambulance and two crews were off duty. When assigned to the ambulance, the employees nonetheless wore their firefighters' uniforms. They described themselves as firefighters, not as ambulance attendants.

Full-time employees who were not dedicated to the ambulance were known as "floaters." They were assigned to work straight days. This would either involve an 8 hour shift (8 a.m. to 4 p.m.) or a 10 hour shift (8 a.m. to 6 p.m.).[4] They would be utilized to substitute for the dedicated

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[3] The terms "part-time firefighters" and "voluntary firefighters" were used interchangeably in the evidence.

[4]This scheduling continued from June 1997 to October 1998.

ambulance personnel on holidays, vacation days, sick days and other absences. On occasion, a floater would cover the ambulance when an ambulance attendant was traumatized by an event and required a critical incident stress ("CIS") debriefing.

During the 14 hour night shift, only the two employees assigned to the ambulance would be on duty full-time. They were dispatched from the station by an ambulance dispatcher, not the fire dispatcher. Even if a fire call came in, they were not permitted to answer the call as firefighters. They would end up at a fire scene only if otherwise dispatched as ambulance personnel. Instead, full and part-time firefighters[5] were paged to respond to any fire call. The breadth of the page would depend upon the nature of the call. Responding firefighters would assemble at the fire station and be dispatched to the scene. Generally, though not invariably, a fire truck would only leave the station, night or day, once four firefighters were available to staff it. Of course, it was not uncommon that more than four firefighters were dispatched to a fire call.

During the day shift, two employees assigned to the ambulance would be on duty full-time. Again, they were dispatched from the station only by an ambulance dispatcher and could only respond to ambulance calls. However, they could perform fire station duties compatible with their availability to staff the ambulance.

Unlike the night shift, floaters were frequently on duty as well. They might be assigned to the same 10 hour shift that the ambulance personnel were on or to the shorter 8 hour shift. The

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[5]Part-time firefighters did not work scheduled hours. They carried 24 hour a day pagers and were expected to be available and respond to a certain percentage of pages, and attend weekly training sessions to maintain their status. Part-time firefighters were responsible for a range of duties, including fire suppression, vehicle extrication and some related medical tasks. They were not permitted to operate the ambulance.

floaters who were not assigned as substitutes for ambulance personnel would perform firefighting and related duties, such as responding to fire calls, station duties, public education, fire prevention and training. As well, the floaters on the 10 hour shift might staff the ambulance for several hours at the end of the day shift to give tired ambulance personnel some relief. The number of floaters on duty available to perform firefighting or related duties varied, depending upon the number of floaters employed by the Service at any point in time and upon whether any or all of the floaters were substituting for the ambulance personnel.

The Service also employed officers who were not assigned to ambulance duties. Sometimes, an officer might take on ambulance duties to meet a staff shortage.

One of the officers was also the fire prevention and public education officer. Numerous public education programs were implemented by that officer. A training committee also existed. Mr. Jeppesen had been a member of that committee.

All of this meant that as of June 1997 (and for a period thereafter), there were no firefighters (other than ambulance personnel) on duty during the evenings and there may or may not have been firefighters (other than ambulance personnel) on duty during the days. This arrangement prompted former Chiefs Guilbault and Mehlenbacher to characterize the Town of Ancaster Fire and Emergency Services as providing a full-time ambulance service and a part-time firefighting service. Mr. Jeppesen (and the Commission in its submissions) characterized the Service as providing 24 hour firefighting and ambulance services, though these services were staffed in different ways. It is common ground that the Service did respond to fire calls 24 hours a day.

Two full-time firefighters were hired as a result of the June 1997 posting. Another two full-time firefighters were hired in November 1997. Three more full-time firefighters were hired as a result of a posting in July 1998. The effect of these hirings on the nature and composition of the Service is extensively discussed later in these reasons. To state the obvious, the additional full-

time firefighters hired by the Service affected the number of firefighters who were on duty during the day performing firefighting or related duties. By the fall of 1998, there were still 8 firefighters assigned to ambulance duties, but there were now 8 additional firefighters or "floaters."[6]

The Legal Capacity to Operate an Ambulance

Regulations to the *Highway Traffic Act* require that a person hold a class F licence or its equivalent to drive an ambulance. Regulations to the *Ambulance Act* require that each ambulance that responds to a call be staffed with a crew of at least *two* attendants. Both attendants need to hold a valid licence to drive that ambulance. The rationale for this requirement is obvious, given the likelihood that the attendants may have to reverse the roles of driver and passenger to permit emergency work on a patient to continue during transport. As well, one of the ambulance attendants may be called upon to drive another ambulance, for example, where a second ambulance has been dispatched from a nearby region to provide additional or a higher level of medical service to patients.[7]

As reflected in the introduction, this case concerns the requirement imposed by the Respondents that all applicants for full-time employment had to be legally qualified to drive an ambulance, which meant that applicants had to retain a class F licence or its equivalent.[8]

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[6]Mark Mehlenbacher was one of the floaters before he became Deputy Chief.

[7]Though the Ancaster firefighters were qualified to provide a basic level of ambulance service, other ambulance personnel were sometimes qualified to provide more advanced medical assistance.

[8]The requirement was characterized in various ways during the hearing: (a) applicants are required to drive the ambulance, or (b) applicants must be legally qualified to drive the

Regulations to the *Highway Traffic Act* also require that a person hold a class D licence or its equivalent to drive certain heavy motor vehicles, including essential firefighting vehicles such as fire trucks. A special Z endorsement establishing proficiency with air brakes is also required to drive some or all of these vehicles.

In June 1997, Mr. Jeppesen held a class A licence with Z endorsement. This licence was equivalent to a class D licence and permitted Mr. Jeppesen to drive fire trucks. As well, this licence permitted Mr. Jeppesen to drive tractor-trailers and similar vehicles. Indeed, Mr. Jeppesen was employed, in his full-time job, as a driver of such vehicles.

Mr. Jeppesen also held a class C licence, equivalent to a class F licence, which would have permitted him to drive an ambulance. This had been acquired in October 1996.

Applicants for both class D and class F licences have to meet certain minimum visual acuity requirements under the *Highway Traffic Act* regulations. Visual acuity, with or without corrective lenses, of no poorer than 20/30 in the better eye and 20/50 in the weaker eye is required. Regulations to the *Highway Traffic Act* permit the Ministry of Transportation to waive these requirements for class D applicants. These regulations were enacted pursuant to the Monocular Vision Pilot Project.[9] The same waiver provisions do not exist for class F applicants.

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ambulance, or (c) applicants must possess or retain a valid class F licence or its equivalent in order to drive the ambulance. Nothing turns on these various formulations of the requirement. What is central to each is the requirement that applicants must retain a valid class F licence or its equivalent in order to operate the ambulance.

[9]This pilot project has a limited duration. However, once accepted into the project, a person's licence will continue to be renewed, if the person remains suitable for waiver.

Mr. Jeppesen's Disability

In December 1995, Mr. Jeppesen had been diagnosed with Histoplasmosis (POHS), an airborne fungal disease affecting his left eye. The disease caused a hemorrhage of the vessel in the retina of that eye, located very close to the centre of his field of vision. Laser treatment commenced in January 1996 and continued for several months to cauterize the vessel and attempt to prevent further damage. The scarring from laser treatment and the damage from the hemorrhage could not be reversed. After a recuperative period and with corrective lenses, Mr. Jeppesen was able to resume his full-time employment as a driver and able to resume driving fire trucks. Indeed, in September 1996, he successfully passed a driver examination for a class F licence and, as previously noted, obtained the equivalent of a class F licence in early October 1996.

Unfortunately, in April 1997, fluid buildup was detected in Mr. Jeppesen's left eye. His visual acuity had worsened. Surgery was performed to restore the vision he had in the fall of 1996. The surgery stabilized his condition but did not result in the desired improvement. Mr. Jeppesen had lost central vision in the left eye but retained his peripheral vision in that eye and, for all practical purposes, could see as well as anyone with both eyes open. However, Mr. Jeppesen no longer met the visual acuity requirements for either class D or F licences.

After surgery, Mr. Jeppesen again recuperated for a period of time. Thereafter, he resumed non-driving duties as a part-time firefighter. Although Mr. Jeppesen still retained his class D and class F licences, he recognized that it was inappropriate to drive firefighting vehicles or tractor-trailers in light of the fact that he no longer met the visual acuity standards set pursuant to the *Highway Traffic Act*.

The June 1997 Application for Employment

Mr. Jeppesen submitted his application for one of the two positions posted in June 1997. He testified that, prior to so applying, he met with Chief Guilbault to discuss his medical condition. Jeppesen advised Guilbault that he was still recovering from retinal surgery and that the prognosis for the vision loss in his left eye was unknown. Jeppesen advised Guilbault that he was uncertain whether he could retain his Class F licence. However, he expressed confidence that he would be able to retain his Class A licence (which enabled him to operate fire trucks) under the Monocular Vision Pilot Project. Guilbault advised Jeppesen to proceed with the hiring process and said he would be weeded out during the medical examination if there was a problem.

Mr. Jeppesen scored well in the evaluation process that followed and was ranked third on the hiring eligibility list. During the hiring process, Mr. Jeppesen had several eye examinations. Mr. Jeppesen's vision was regarded as functionally satisfactory to perform all of the duties of a full-time employee. The visual acuity requirements imposed by the regulations to the *Highway Traffic Act* were not addressed at that time.

On July 25, 1997, Jeppesen was advised by Guilbault that one of the successful candidates had declined the position. Guilbault offered Jeppesen the job commencing on August 5, 1997. Jeppesen requested a meeting with Guilbault to discuss any future problems arising out of his inability to meet the sight requirements for the Class F licence. A meeting was scheduled for Monday, July 28, 1997. The weekend before, Jeppesen met with Deputy Chief Thomas and Lieutenant Riouw. Jeppesen advised them that he was unsure of his visual prognosis and whether he would be able to retain the Class F licence. Jeppesen was advised that he would not be able to obtain the full-time position without a Class F licence.

On July 28, 1997, Mr. Jeppesen met with Chief Guibault. Guilbault advised Jeppesen that he could not obtain the full-time position without a Class F licence. However, he would be kept at the top of the eligibility list to allow him the opportunity and time to resolve the issue of his class F licence.

Chief Guilbault did not recollect that Mr. Jeppesen had discussed his visual impairment with him prior to the competition. His best recollection was that the discussion only occurred once he offered Mr. Jeppesen a job. It is unnecessary to resolve this genuine difference in recollection. I am satisfied that Mr. Jeppesen candidly revealed his difficulty to Chief Guilbault before his employment status was finalized. Accordingly, nothing turns on the different recollections here.

On August 5, 1997, Chief Guilbault advised Mr. Jeppesen by letter that he could not offer him a position. He stated that "should the situation with respect to your medical condition change, and you receive medical clearance, you will be considered for a position...if and when a position becomes available." Chief Guilbault was prepared to retain Mr. Jeppesen's name at the top of the hiring eligibility list, meaning that Mr. Jeppesen would likely have the next available full-time position, if the licencing impediment could be resolved.

It is clear that Mr. Jeppesen did not seek accommodation from the Respondents from June 5 to August 5, 1997. He still regarded Chief Guilbault as supportive and working together with him to try to resolve the situation. As well, he recognized the problems inherent in offering him employment *at that time*, given the limited number of firefighters (11) then employed by the Service and the involvement of firefighters in operating the ambulance. There is no allegation that the Respondents discriminated against Mr. Jeppesen by failing to offer him employment from June to August, 1997 or by failing to accommodate him *at that time* by waiving the requirement that he retain a class F licence.

The Request for Accommodation

On or about August 15, 1997, Mr. Jeppesen applied for a vision waiver under the Monocular Vision Pilot Project.

On or about November 4, 1997, Deputy Chief Thomas, since deceased, advised Mr. Jeppesen that the Service had obtained approval to hire two more full-time firefighters. These positions were to be filled by resort to the hiring eligibility list, rather than through a new posting. Thomas was calling to ascertain the status of Mr. Jeppesen's class F licence. Mr. Jeppesen advised him that the situation was the same. He was waiting for a decision on his waiver application for the class A licence but he still could not obtain a class F licence. Mr. Jeppesen met with Chief Guilbault that same day, asking to be hired on an "equal opportunity basis." He requested that the decision on hiring, which was otherwise to be made on November 19, 1997, be deferred to see if the waiver application would be granted and to address the class F licence problem. Chief Guilbault agreed and undertook to raise the matter with the town's lawyers. Mr. Jeppesen was asked to put his request in writing.

Mr. Jeppesen met with Chief Guilbault again on November 7, 1997 to determine Guilbault's biggest concerns about accommodating him and the ways in which Jeppesen could alleviate those concerns.

After meeting with Chief Guilbault on November 7, Mr. Jeppesen contacted the Ministry of Transportation to determine whether the Class F licence could be included in the Monocular Vision Pilot Project. Jeppesen was advised by the Ministry that the class F licence could not be included. He even went to the Ministry's head office and raised the matter with Mr. Palladini. He was told that "it's the law."

Although Mr. Jeppesen did inquire, without success, as to whether the Ministry of Transportation would extend its waiver project to the class F licence, he did not formally pursue accommodation from the government. He acknowledged that, in retrospect, perhaps he should have. He did not know why he did not pursue accommodation from the province, except that he believed that seeking accommodation from his employer would be easy and that obtaining relief from the government would require a legislative change.

As both Chief Guilbault and Mr. Jeppesen noted in their testimony, the curious effect of the *Highway Traffic Act* regulations was that Mr. Jeppesen could be deemed capable of driving a 45,000 lb. fire truck but incapable of driving an ambulance. Chief Guilbault found unconvincing the Ministry of Transportation's position that an ambulance carries members of the public: hence, the distinction. As will be noted below, it is the Respondents' position that Mr. Jeppesen should have sought accommodation from the province rather than from the Respondents.

In a letter dated November 20, 1997 to Chief Guilbault, Mr. Jeppesen formally requested accommodation. Mr. Jeppesen argued that the class F licence was no longer a *bona fide* qualification, given the number of available firefighters. The letter also noted as follows:

> "I would appreciate serious consideration on this matter and hope that with your advocation the single barrier that prevents me this position can be removed. As you yourself stated, this hiring is ground breaking for the Town of Ancaster, in that you are not specifically hiring personnel to cover the ambulance but to cover firefighters duties..."

By letter also dated November 20, 1997, Chief Guilbault indicated that he could not offer a firefighter position to Mr. Jeppesen because he did not possess a valid F licence which is a

condition of employment.[10] Chief Guilbault testified that Mr. Jeppesen was a good firefighter. It was only his inability to retain a class F licence that prevented the Respondents from hiring him.

Chief Guilbault testified that the Service's "setup" did not permit him to accommodate Jeppesen. He had no authority to pull or change the job qualifications at that point in time. The mayor and the elected council for the Town of Ancaster were responsible for setting the level of service to be provided by the town's fire and emergency service. In any event, he felt that as long as they were still operating a full-time ambulance service and a part-time fire service, the requirement could not be eliminated. He suggested that the effect of accommodating Mr. Jeppesen would have been to have a firefighter in the station only to do maintenance and cleaning. Firefighters had to be paged in to fight fires anyway since at least four were needed to staff a fire truck. (As I later note, much of this reasoning was understandable in mid-June 1997 but lost its potency as more full-time firefighters were hired in late 1997 and in 1998.)

Mr. Jeppesen found the immediate denial of his request deeply distressing. It affected his perception of Chief Guilbault's supportiveness. In fairness, before and after November 20, 1997, Chief Guilbault explored this issue with the town's legal counsel and with the Ministry of Transportation. He had been advised that the class F requirement could not be waived.

On November 25, 1997, Mr. Jeppesen's application to participate in the Monocular Vision Pilot Project was approved for his class A licence. He then successfully fulfilled the required written and road tests and, on January 5, 1998, was permitted to retain his class A licence. The visual acuity requirements were thereby waived. (Mr. Jeppesen's waiver has been reviewed and renewed annually since then.)

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[10]To be strictly accurate, Mr. Jeppesen could not *retain* a "class F" licence or its equivalent. He continued to have such a licence at this time but, acting responsibly, was not operating vehicles for which such a licence was required.

During the month of November 1997, two additional full-time firefighters were hired for a total complement of 13 full-time firefighters. These two firefighters had been next in line behind Mr. Jeppesen on the hiring eligibility list. They commenced employment on January 5, 1998.

On January 6, 1998, Mr. Jeppesen, having received Ministry of Transportation approval to retain his class A licence, returned to his full-time work as a tractor-trailer driver. He also resumed driving fire trucks.

On July 13, 1998, the Service posted a notice that it required three additional full-time firefighters. Rather than repeat the application process and unnecessarily spend the $250.00 application fee, Mr. Jeppesen wrote to Chief Guilbault inquiring whether the Chief's position remained the same on his request for accommodation. Although no response was received by the deadline for submitting the application, Mr. Pinelli, the Respondents' counsel, subsequently advised Mr. Jeppesen by letter that the Chief's position did remain the same. Mr. Pinelli stated that accommodation was not possible at this point in time. However, he indicated that mediation, which had been arranged through the Commission, would be approached by the Respondents with an open mind.

Mediation was unsuccessful. As a result, three other firefighters were hired instead of Mr. Jeppesen. These firefighters commenced employment on September 1, 1998.

In September 1998, Mr. Jeppesen requested a leave of absence from his position as a part-time firefighter. Though this related, in part, to changes in his full-time employment as a tractor-trailer driver, he also found it hard to function within the Ancaster Fire Department, given what he characterized as the "ongoing conflict with the Chief." After at least one extension of his leave of absence, Mr. Jeppesen determined that he would withdraw from part-time work with the

town. He candidly acknowledged that he could not function within the Service anymore, given the legal conflict between him and the Service and given the emotional toll upon him. Although his complaint to the Commission remained outstanding, he no longer sought employment, through accommodation, from the Respondents.

The Need for Enhanced Firefighting Services

In October 1998, with the addition of the three new firefighters, the Service moved to what Mark Mehlenbacher described as "12 hour, 7 days a week fire coverage." This meant that from October 6, 1998, the 8 floaters worked 12-hour day shifts, 7 days per week, 4 days on and 4 days off. This approach was intended to enhance the fire service by having a crew of full-time firefighters (other than those dedicated to the ambulance) on duty for 12 hours every day. The Service looked forward to further enhancing the fire service by having a crew of full-time firefighters (again, other than those dedicated to the ambulance) on duty 24 hours every day.

The Commission produced a statistical summary of the 1998 Shift Schedule. The calculations were unchallenged. The summary showed that from January 5, 1998 until December 31, 1998, there were two or more floaters in the station scheduled to perform firefighting duties (rather than substitute for ambulance personnel) on 96.5% of the working days. Of course, there would be unscheduled substitutions required (such as for illnesses) during the course of the year.

Number of working days[11] from January 5 through December 31	Number of working days when TWO OR MORE floaters scheduled	Number of working days when ONE OR FEWER floaters scheduled	Number of working days where schedule not provided by Respondents
284	274	5	5
Expressed as percentage of total number of working days	96.5%	1.8%	1.8%

The Shift Schedule for 1998 and the *viva voce* evidence also revealed that the same eight firefighters were assigned to ambulance duties for the entire year. Of course, these firefighters would be substituted for at various times and for various reasons during the year by the floaters. As well, the schedule could be modified during the year as circumstances dictated. However, what this meant was that the five firefighters who were hired during this time frame (rather than Mr. Jeppesen) were scheduled to be floaters at least for the balance of 1998, if not beyond.

Deputy Chief Mehlenbacher testified that, in 1998, once that year's hirings had been completed, there would generally have been a ratio of four floaters to every two firefighters assigned to the ambulance. When Lieutenant Riouw was on duty, the ratio would be 3:2. Similarly, there was an acting officer on duty at all times during the A crew shift so the ratio there would be 3:2 when the staff was full.

In December 1999, amalgamation of the municipalities comprising the Regional Municipality of Hamilton-Wentworth occurred. In May 2000, the Service hired four additional full-time firefighters, bringing the total complement to 20. (Captain Olivieri indicated that four of these firefighters were acting officers.) The Service did continue to provide ambulance services until August 1, 2000 when these services were assumed by the City of Hamilton/Regional

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[11] "Working days" defined as: Monday through Friday for the months January through September, and Sunday through Saturday for the months October through December.

When it was decided that the Service would stop providing ambulance services, then Chief Mehlenbacher was quoted in the media as follows:

> "We've moved slowly towards this over the past few years...This is a positive step by council. It brings us to where we should have been five years ago. Citizens expect certain services and adequate fire is one of these. A balanced system, where a crew of four full-time firefighters working 24 hours a day handle the majority of minor calls, combined with volunteers assisting at larger emergencies, would provide the most efficient level of fire protection for the citizens of Ancaster."
>
> "The bottom line is the town is spending too much on ambulance service and not enough on firefighting."
>
> "The guys are ecstatic... They want to be firefighters. That's what they were trained to do."
>
> "Our firefighters have to get back on the road and do what their primary job is"
>
> "Why are we getting out? We're becoming a large city and it's time to get out..We just can't do both any more."
>
> "It's always been a long term goal for me to move to 24-hour firefighting...We're bringing the firefighters back to firefighting."

During the time frame in which Mr. Jeppesen sought employment, with accommodation, from the Respondents, it was not known or necessarily expected that amalgamation would occur or that the Service would relinquish its ambulance related responsibilities. This is relevant since the Respondents' ability to accommodate Mr. Jeppesen, without undue hardship, cannot be evaluated in hindsight. However, the evidence is overwhelming that, during that same time

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[12]The decision that the Service would relinquish its ambulance related duties was made in mid-2000 and implemented in August of that year.

frame, it was abundantly clear that the *firefighting* demands upon the Service compelled it to increase its contingent of full-time firefighters and move to a system that, in the least, had full-time firefighters on duty, dedicated to firefighting, during the days.

Most significant in this regard was the dramatic increase in the number of fire calls to the Service from year to year. In 1996, there were approximately 475 fire calls and 2100 ambulance calls. In 1997, there were approximately 514 fire calls and 1950 ambulance calls. In 1998, there were approximately 827 fire calls and 2083 ambulance calls.

A bit of the increase in fire calls, according to Deputy Chief Mehlenbacher, was attributable to the implementation of a "tiered response" in 1998. This meant that a firefighting crew might be sent to assist the ambulance crews on certain ambulance calls.

In 1999, there were 1050 fire calls, more than double the number in 1996, and 2575 ambulance calls. This increase in 1999 would have been anticipated given the trends earlier described.

As fire and ambulance calls increased, the number of firefighters dedicated to the ambulance stayed the same. Indeed, the Service only had one ambulance throughout. (It was not the only ambulance service in the area. For example, private ambulance services were also operating in the region.[13]) However, as noted, the number of firefighters hired increased. Whereas there were 9 active full-time firefighters in early 1997, there were 16 by the fall of 1998.

Mr. Jeppesen and Chief Guilbault both described Guilbault's arrival at the Service in 1997.

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[13]One reason why the ambulance service was not enhanced was because of the extensive three year training required to train firefighters as true paramedics.

The floater (the 9th active firefighter) was being used on the ambulance and no one was in the station. This disturbed Chief Guilbault. Also in 1997, Chief Guilbault was involved in a task force that examined the delivery of fire and ambulance services. Response times for fire calls were of concern and, at times, problematic. Chief Guilbault's ultimate goal was to have a 24 hour fire service which would require the hiring of more full-time firefighters. Of course, more full-time firefighters would enhance response times.[14] As well, the *Fire Protection and Prevention Act, 1997*[15] statutorily mandated the town to provide adequate fire services to its populace. Chief Guilbault recognized the difficulties in fulfilling this statutory requirement without more firefighters. Chief Guilbault and his successor Chief Mehlenbacher's public comments were consistent with their belief that, in the least, the Service had to move to a system which provided for full-time firefighters dedicated to firefighting duties at least 12 hours a day and ultimately 24 hours a day. This was so, whether or not the Service continued to assume ambulance related responsibilities.

Although the mayor and town council determined the level of service provided by the Town of Ancaster, I find that it was clearly recognized by November 1997 that the hiring of more full-time firefighters was necessitated by the growth in the area, the increase in the number of fire calls and the statutory mandate under the *Fire Protection and Prevention Act, 1997.*

Thus, it may not have been inevitable, when Mr. Jeppesen sought employment, through

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[14]There was evidence that, even in 2000, response times remained, at times, problematic. The Service was severely criticized for its unacceptable response time to a large school fire in April 2000. The two ambulance assignees could not respond. It took two pages to assemble sufficient personnel to staff the truck and leave the station.

[15]S.O. 1997, c.4, as amended.

accommodation, that the Service would abandon its ambulance related responsibilities, it became inevitable during that period that additional firefighters were to be hired by the Town of Ancaster largely to respond to the increased firefighting and fire prevention needs of the Service.

The Number of Firefighters Needed to Operate the Ambulance

Various witnesses expressed opinions on the number of firefighters needed by the Service to enable it to run the ambulance.

The Respondent David Guilbault was the Fire Chief from January 1997 to January 1999. As Chief, he was responsible for the general management of the Service, including strategic planning. When he arrived in Ancaster, there were 11 full-time firefighters, one of whom was on disability. That firefighter, and one other, were soon to retire, leaving nine active full-time firefighters. There was no serious dispute that, given the need for eight full-time firefighters dedicated to the ambulance and the need for available floaters for substitutions, nine full-time firefighters were inadequate to enable the Service to staff the ambulance.

Chief Guilbault testified that while, in theory, eight full-time firefighters could staff the ambulance, in reality, 11 full-time firefighters were needed to cover for situations in which the ambulance attendants were sick, disabled, went on holidays or trained. Deputy Chief Mehlenbacher, who was responsible for the day-to-day operations of the Service held a similar view. Accordingly, Chief Guilbault suggested that although the June 1997 posting was for two firefighters' position, these firefighters were being hired mainly to work on the ambulance.

Captain Harry Olivieri is the Service's Fire and Life Safety Officer. He was first employed as a volunteer in 1984 and, for the last 11 years, has been a full-time employee. He became an officer in 1997. He testified that, based upon his experience, his management role and his tenure with the Service, 12 not 11 full-time firefighters were needed to adequately staff the ambulance

service. With four shifts, that would allow for the eventuality of one of those persons being away.

Olivieri testified that, from May through September, 1997, there never seemed to be enough staff, given holidays, vacations and illnesses. The job was very stressful. There was little time for firefighting training. Many full-time firefighters did not return for Wednesday night training sessions given the stresses. It was very difficult to engage in firefighting training during the day, particularly where two employees were dedicated to the ambulance and only one person might otherwise be in the station. This was particularly so because firefighting training is largely a team activity. I further discuss issues surrounding firefighting training below.

When two firefighters were hired in the summer of 1997, their training was almost exclusively ambulance related. Olivieri did not regard the 3 floaters as "extra bodies." Often, there were not any floaters available who were unassigned to the ambulance. The hiring of these two firefighters alleviated the situation somewhat once they were able to handle ambulance duties. The pressure was further alleviated once two more firefighters commenced employment in early 1998. There were some staff shortages thereafter. Olivieri was sometimes asked to cover the ambulance in 1998 though he was an officer.

Deputy Chief Mehlenbacher described the ratio of ambulance to fire calls as roughly 4:1 and sometimes higher during the relevant period. The Respondents suggested that certain inferences as to the amount of time that firefighters spent on ambulance duties could be drawn from the ratio. I accept that those firefighters assigned to the ambulance would devote over 80% of their time to ambulance duties. This statistic has obvious relevance to the eight firefighters assigned to the ambulance in 1998. However, there was no easy correlation between the ratio of ambulance to fire calls and the percentage of time that *floaters* spent on ambulance duties.

As well, there was no necessary correlation between the number of ambulance versus fire

calls and the hours devoted by full-time firefighters to one activity as opposed to the other. For example, whereas only two firefighters might respond to an ambulance call, at least four firefighters would generally respond to a fire call and, when required, more. The firefighting response might involve different combinations of full and part-time firefighters. Further, whereas an ambulance call took, on average, one to one and a half hours, there was greater variation in the length of time involved in a fire call. To state the obvious, a false alarm would involve less time than a raging fire scene. Finally, no one attempted to quantify the time involved in fire prevention, education and training as opposed to ambulance training or certification. It was obvious, however, that the extensive hours related to fire prevention, education and training bore no relationship to the number of fires the Service had to respond to.

Firefighting Training

Various witnesses described the existing training for firefighters. The effect of accommodating Mr. Jeppesen upon the Service's ability to train was an issue in the proceeding. Prior to Chief Guilbault's tenure, Wednesday night training sessions were mandatory for both full-time and part-time firefighters. Chief Guilbault emphasized on-duty daytime training instead. The Wednesday night sessions only remained mandatory for part-time firefighters. It was felt that full-time firefighters could not be compelled to attend such sessions in addition to their scheduled shifts. There was some evidence that labour laws may have factored in this decision.

Daytime training was difficult at the best of times, given the preference to train in crews and the need for on-duty firefighters to response to both ambulance and fire calls. For ambulance personnel to be trained, they were rotated out of the ambulance and onto the fire trucks. This meant that other firefighters had to substitute for them on the ambulance. In 1997, a complement of only 11 firefighters made training more difficult, if not impossible. Only one extra person would generally remain in the station. If floaters could not substitute for ambulance personnel,

the latter would have had difficulty meeting training requirements. Deputy Chief Mehlenbacher suggested that, as it was, the training was so lacking that the Service may have been in violation of the *Occupational Health and Safety Act*. He expressed the view that by October 1998, training may have achieved minimum required levels, though far from desirable. The suggestion was that, had Mr. Jeppesen been hired in 1997, the ability to train firefighters dedicated to the ambulance would have been further reduced. The Commission's position, shared by Mr. Jeppesen, was that these concerns were largely speculative, could have been addressed through alternative approaches to training and, in any event, became inapplicable as more firefighters were hired. Mr. Jeppesen also testified that he was a member of the training committee and was prepared, if hired, to take an active role in planning and executing training sessions for the firefighters.

Conclusion

In resolving the issues in this proceeding, I considered the totality of the evidence before me. Much of that evidence has been summarized above. Other aspects of the evidence and further findings of fact are more conveniently reflected in the analysis which follows.

ISSUES

The complaint alleges that the Respondents infringed Mr. Jeppesen's rights under sections 5(1) and 9 of the *Code*. Section 5(1) provides, in part, that every person has a right to equal treatment with respect to employment without discrimination because of handicap. Section 9 provides that no person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

No distinction was sought to be drawn by any party to this proceeding between the

Respondent, the Service and the Respondent David Guilbault for the purpose of determining whether they infringed Mr. Jeppesen's rights under the *Code*. Given David Guilbault's responsibilities as Fire Chief at the material time and his role in dealing with Mr. Jeppesen's request for accommodation, I agree that no distinction is properly drawn in this regard.

Accordingly, two issues need be resolved:

(1) Did Mr. Jeppesen have a handicap, as defined by the *Code*?

(2) Was he discriminated against by the Respondents because of his handicap?

The determination whether Mr. Jeppesen was discriminated against by the Respondents because of his handicap compels a two-stage analysis, each stage involving a different burden of proof:

> (a) Has the Commission shown on a balance of probabilities that Mr. Jeppesen was *prima facie* discriminated against by the Respondents because of his handicap?
>
> (b) If so, have the Respondents shown on a balance of probabilities that Mr. Jeppesen was not discriminated against because of his handicap because the requirement that resulted in his exclusion from employment was reasonable and *bona fide* in the circumstances?[16]

HANDICAP

Section 10(1)(a) of the *Code* defines "handicap" so as to include "any degree of physical disability that is caused by illness including visual impairment." Mr. Jeppesen suffers from a permanent loss of central vision in his left eye caused by Histoplasmosis, an airborne fungal

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[16]Otherwise, known as a *bona fide* occupational requirement ("BFOR"). The issue here is most conveniently framed in the language of section 11 of the *Code*. The interplay between sections 11 and 17 of the *Code* is discussed below.

disease. It is beyond dispute that this is a physical disability caused by illness. Indeed, visual impairment is specified in the *Code*. I find that, at all material times, Mr. Jeppesen did have a handicap as defined under the *Code*.

DISCRIMINATION

Overview of Legal Principles

The legal analysis which follows is largely drawn from the recent judgment of Laskin J.A, speaking for the Ontario Court of Appeal, in *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18.

Historically, the jurisprudence established that an infringement of section 5 of the *Code* could be characterized as "direct discrimination" or "adverse effect discrimination." Direct discrimination was said to address an occupational requirement which was discriminatory on its face. Adverse effect discrimination was said to arise in the following circumstances:

> "...where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce." *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 549.

The distinction between direct and adverse effect discrimination often had significance because the test imposed upon the employer to justify the requirement and the remedy for an infringement varied depending upon the characterization of the discrimination.

In *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. ("Meiorin")*, [1999] 3 S.C.R. 3, the Supreme Court of Canada recognized the artificial and, at

times, arbitrary distinction between direct and adverse effect discrimination. In *Entrop,* Laskin J.A. summarized the reasons given by McLachlin J. (as she then was) in *Meiorin* for abandoning the distinction in favour of a "unified approach"(at pp.44-45):

1. The distinction is artificial. Few cases "can be so neatly characterized", and the distinction is unrealistic because today most employers use neutral words whatever their intent.

2. The remedies could differ depending on the kind of discrimination. If the employer could not justify a workplace rule that was discriminatory on its face, the rule would ordinarily be struck down. The employer, however, could maintain a rule that was neutral on its face but discriminatory in its effect, by accommodating individuals affected by the discrimination to the point of undue hardship. A different result flowing from a questionable initial classification is difficult to justify.

3. The rationale for the remedy for adverse effect discrimination is questionable. Facially neutral workplace rules were permitted to remain in effect because ordinarily they affected a minority of employees. But permitting a neutral rule to stand because it did not adversely affect the majority of employees is difficult to defend. Moreover, the size of the "affected group" can be manipulated and, in some cases, can actually constitute a majority of the workplace.

4. Although the defences to direct and adverse effect discrimination differed, the differences were hard to define; in practice, probably no meaningful distinction existed.

5. The distinction between direct and adverse effect discrimination may legitimize systemic discrimination. If a workplace rule is characterized as neutral on its face, its legitimacy is not questioned. Instead, the inquiry focuses on whether the complainant can be accommodated.

6. Permitting a workplace rule to be questioned only if it is discriminatory on its face does not permit human rights statutes "to accomplish their purpose as well as they might otherwise do."

7. The court's approach to human rights legislation should not differ from the court's approach to the equality guarantee in s.15(1) of the *Canadian*

> *Charter of Rights and Freedoms.* Eliminating the distinction between direct and adverse effect discrimination is more consistent with the court's interpretation of s.15(1), which principally focuses on the effect of the challenged law.

The unified approach adopted by the Supreme Court of Canada provides for a three-step test for determining whether a *prima facie* discriminatory standard is a *bona fide* occupational requirement. An employee may justify the impugned standard by establishing on a balance of probabilities:

> (a) that the employer adopted the requirement for a purpose rationally connected to the performance of the job;
>
> (b) that the employer adopted the particular requirement in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (c) that the requirement is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the requirement is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) ("Grismer")*, [1999] 3 S.C.R. 868, McLachlin J. (as she then was) articulated the significance of this unified approach (at p.880):

> "...*Meiorin* announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged

against presumed group characteristics."

Meiorin's three-step, unified approach was formulated in the context of a discrimination complaint under the British Columbia *Human Rights Code.* There are differences between the wording of the Ontario and British Columbia Codes.

The Ontario *Code* provides an employer with two separate defences to a *prima facie* case of discrimination based on handicap.

Section 11 of the *Code* reads, in part:

> 11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> > (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances;...
>
> (2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Section 17 reads:

> 17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.
>
> (2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be

> accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements.

In *Entrop*, Laskin J.A. described the differences between the Ontario and British Columbia statutes in these terms (at pp. 46-47):

> "Section 11 of Ontario's Code sets out in detail the elements of a BFOR; the comparable provision of the British Columbia, s. 13(4), provides simply that "subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement." In the case of handicap discrimination, s. 17 of the Ontario Code has no counterpart in the British Columbia Code."

As well, section 11, unlike the British Columbia Code, explicitly recognizes the distinction between adverse effect and direct discrimination when it sets out the available BFOR defence to a requirement "that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination."

There are also differences in wording between sections 11 and 17 of the Ontario *Code.* Firstly, the explicit recognition of the distinction between adverse effect and direct discrimination contained in section 11 is not found in section 17 of the *Code.* Prior to *Meiorin,* this difference in wording between sections 11 and 17 was interpreted as meaning that section 11 applied to cases of adverse effect discrimination and section 17 applied to cases of direct discrimination: *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital* (1999), 42 O.R. (3d) 692.

Secondly, section 17 compels the employer to demonstrate that the complainant was *incapable* of performing or fulfilling *essential* duties or requirements because of handicap. Further, it focuses on whether the needs of the *person* alleging an infringement cannot be

accommodated without undue hardship. Section 11 requires the employer to demonstrate that the requirement was a BFOR, which involves proof that the needs of the *group* of which the person is a member cannot be accommodated without undue hardship.

The preservation of the distinction between adverse effect discrimination and direct discrimination in the *Code* as well as the differences between the Ontario and British Columbia Codes raised the question as to how the *Meiorin* approach was to be applied in Ontario.

In *Entrop,* the Ontario Court of Appeal held that the unified, three-step approach articulated in *Meiorin* should be applied in Ontario. Laskin J.A. concluded that:

> (a) *Meiorin* and *Grismer* appear to contemplate, by their breadth, an application of the test generally to discrimination claims under human rights legislation unless statutorily precluded;
>
> (b) As McLachlin J. noted in *Meiorin,* a comparison of sections 11(2) and 17 of the *Ontario Human Rights Code* already reflects a unified approach;
>
> (c) Although the language of section 11(1) does reflect the distinction between direct and adverse effect discrimination, the situations to which it does not apply can be limited to those few cases that can be neatly characterized as cases of direct discrimination.
>
> (d) The unified approach is consistent with the language of sections 11 and 17 and the jurisprudence under those sections. The unified approach combines the elements of the previous test for justifying adverse effect discrimination and the elements of the previous test for justifying direct discrimination. The differences in the tests are largely semantic.

In *Entrop,* the Board of Inquiry found *prima facie* direct discrimination and, based upon the existing jurisprudence, confined the Respondent to a section 17 defence. Laskin J.A. concluded that the characterization of the discrimination as direct or indirect was problematic and that,

therefore, the Respondent in *Entrop* could rely on section 11 as well as section 17 of the *Code.* However, under either section, the Respondent would have to satisfy the three-step test in *Meiorin.*

In the case before me, the parties have largely framed their submissions in terms of section 11 of the Code.[17] This is perfectly understandable. This is not a case that could "neatly be characterized" as one of direct discrimination. On the contrary, the complaint is framed exclusively as one of adverse effect discrimination. Therefore, section 11 undoubtedly has application to this case.

However, I am also satisfied that the result in this case would be precisely the same whether the Respondents sought to establish that the impugned requirement was reasonable and *bona fide* in the circumstances under section 11(2) or that Mr. Jeppesen was incapable of performing or fulfilling an essential duty or requirement of employment under section 17(2). Any differences between the operative tests are, certainly for the purposes of this proceeding, immaterial. Laskin J.A. noted that the differences in the tests are *largely* semantic. Given my findings of fact in this case, it is unnecessary to resolve what kinds of disability cases, if any, remain where the differences between sections 11(2) and 17(2) may affect the result.

Accordingly, the parties and I have utilized the language of section 11(1) of the *Code* in determining whether the Commission demonstrated that the Respondents *prima facie* discriminated against Mr. Jepessen. Similarly, the parties and I have utilized the language of section 11(2) in determining whether the Respondents had established their statutory defence to *prima facie* discrimination. Ultimately, the determination as to whether the Respondents had a

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[17]On occasion, the submissions on behalf of the Respondents were framed in the language of section 17. Those submissions had equal application to sections 11 and 17 of the *Code.*

defence to *prima facie* discrimination, whether under section 11(2) or section 17(2), was made upon application of the unified approach in *Meiorin.*

Prima Facie Discrimination

I now address whether the Commission demonstrated on a balance of probabilities that the Respondents imposed a requirement for employment that resulted in the exclusion of a group of persons identified by handicap and of whom Mr. Jeppesen is a member.

Mr. Jeppesen and the Commission submitted that the requirement that successful applicants for full-time employment retain a class F licence constituted discrimination in that it had the effect of excluding persons with visual disabilities such as Mr. Jeppesen from becoming full-time firefighters.

The Respondents submitted that the Service did not have any standard for visual acuity that had to be met by Mr. Jeppesen. He was not denied employment because of his visual deficit. Instead, he was denied employment because he could not retain a class F licence, statutorily required for the operation of an ambulance. Therefore, Mr. Jeppesen had a legal impediment to being hired, rather than one which fell within the definition of handicap under the *Code.* Put another way, the Respondents "cannot be guilty of discrimination when an essential requirement of the position, a class F licence, is statutorily mandated."

It is true that the Government of Ontario imposes a legal requirement that an ambulance operator possess a Class F licence. However, it was the Respondents who imposed a requirement that its full-time employees be legally qualified to drive an ambulance and therefore possess a class F licence. Put another way, the only reason why an applicant needed to possess a Class F

licence is because he or she was required *by the Respondents* to operate an ambulance. [18]

It follows that the real issue here is whether the requirement imposed by the Respondents that all full-time employees be legally qualified to operate an ambulance is *prima facie* discriminatory against Mr. Jeppesen.

This requirement is, on its face, neutral and applies equally to all applicants for full-time employment. However, I find that it had a discriminatory effect upon Mr. Jeppesen because it imposed, because of his visual impairment, a restriction or disqualification not imposed on others.

The Respondents relied upon *Belyea* v. *Canada (Statistics)*, [1990] C.H.R.D. No. 1 to support their argument that the requirement was not even *prima facie* discriminatory.

In *Belyea,* a Canadian Human Rights Tribunal considered a complaint against Statistics Canada that it discriminated on the grounds of disability. Mr. Belyea alleged that Statistics Canada refused to employ him as a census representative during the 1996 federal census because he suffered from epilepsy, an allergy and a hernia condition. Statistics Canada maintained that Mr. Belyea's failure to obtain the job was only related to his lack of a car. Even if this could be described as discrimination, which was not conceded, Statistics Canada argued that the requirement of a car was a *bona fide* occupational requirement within the meaning of the *Canadian Human Rights Act.*

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[18]The requirement imposed by government that a class F licence or its equivalent is needed to operate an ambulance is further addressed in the context of whether the Respondents could accommodate Mr. Jeppesen short of undue hardship and whether Mr. Jeppesen should have sought accommodation from the government.

In Mr. Belyea's application for employment, he indicated that he could not engage in heavy lifting and suffered from an allergy and epilepsy, both under control with medication. He had been advised by his doctor not to lift heavy loads because of his hernia. Mr. Belyea testified that medication had increasingly controlled the frequency of his epileptic seizures. At the material time, he was forewarned of the onset of an attack and could take his medication in a timely fashion, and had not had a seizure for over a year. However, his doctor had advised against him driving until the gap between seizures was more substantial, although he was in fact holding a valid driving licence.

There was conflicting evidence on the events that followed his application for employment which is unnecessary to summarize here.

The Tribunal concluded, in part, as follows (at p.9):

> "Having reviewed the evidence in detail the tribunal finds that Mr. Belyea has failed to make out a *prima facie* case of adverse impact discrimination in this complaint. The Statistics Canada brochure which was introduced into evidence....makes it clear...that full time use of a car and a valid driver's licence was a requirement in "some urban areas." We consider it entirely reasonable for Statistics Canada to establish that requirement and to exercise its discretion based on experience in determining in what urban contexts a car is required. The requirement is clearly not discriminatory on the face of it. Nor is it, in our opinion, discriminatory by virtue of adverse impact. It is surely within the capacity of any employer to decide that a particular job is one which requires an ability to drive and use a vehicle. Were it not so a wide range of organizations, institutions and business would be seriously incommoded in their operations. The necessary effect of such a requirement is that some people will be excluded from consideration for a job in which an ability to drive is deemed to be essential or at least important. However, it is not only individuals who are disabled from driving who will be adversely affected but anyone who for any reason does not have a vehicle available and/or is not in a position to drive one. This could well include those who cannot pass the test, or who for economic reasons do not have access to a vehicle. Individuals with disabilities are not being singled out consciously or unconsciously for special treatment in the case of an employment condition of this

> type. It is thus different from the situation in *Ontario Human Rights Commission v. Etobicoke* [1982] 1 S.C.R. 202 in which the age requirement for firemen only operated against those who had reached the maximum age, and that in *O'Malley v. Simpson Sears Ltd.* [1985] 2 S.C.R. 536 in which the requirement of working on Saturdays would effectively only impact negatively on those whose religious beliefs caused them to treat that day as a day of rest. An employment practice can only be classified as discriminatory which singles out an individual or group of individuals for adverse treatment because they exhibit one or more of the characteristics mentioned in s.3(1) of the *Canadian Human Rights Act.* That such an individual or group is indirectly adversely affected by a reasonable job requirement that excludes a broader range of people is not sufficient to warrant a finding that a *prima facie* case of discrimination has been made out, unless, of course, an intention to discriminate can otherwise be found."

I express no opinion on whether Mr. Belyea's complaint was properly dismissed and, in particular, whether the requirement of a car was a *bona fide* occupational requirement in that case. However, with respect, I disagree with the reasoning that caused the Tribunal to conclude that Mr. Belyea had failed to make out even a *prima facie* case of discrimination. The Tribunal concluded that an employment practice can only be characterized as discriminatory where only the disabled individual or the group of which he or she is a member is adversely affected by the job requirement, unless an intention to discriminate is otherwise shown. In my view, this reasoning is inconsistent with the body of jurisprudence pertaining to adverse effect discrimination and with the recent decision of the Supreme Court of Canada in *Meiorin, supra.* Indeed, the same reasoning might have resulted in the defeat of the complainant's claim (which succeeded) in *Meiorin.*

In *Meiorin,* a female complainant failed one of the fitness tests for forest firefighters. The Court held that where employers seek to maintain safety by setting higher than necessary standards, and where men and women do not have an equal ability to meet the excessive standard, the effect may be to exclude qualified female candidates from employment for no reason but their gender. This is so, whether or not the effect of the aerobic standards might also be to exclude male applicants. In *Meiorin,* the aerobic standards had a disproportionately negative

effect on women as a group.

Belyea is not binding upon me. I am advised that it has not been cited or followed in any other cases. For the reasons indicated, I decline to adopt its reasoning or its applicability to this case.

The requirement that all firefighters be legally qualified to drive an ambulance *prima facie* constituted discrimination. It excluded persons with visual disabilities, including Mr. Jeppesen, from becoming full-time firefighters. It affected Mr. Jeppesen, and persons similarly situated, differently from others to whom it might have applied. It was *prima facie* discriminatory because of the disproportionate effect of the requirement upon persons with Mr. Jeppesen's disability: See also *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd., supra* at p. 549.

Accommodation without Undue Hardship

Descriptions of the Duty to Accommodate

As earlier reflected, my finding that a *prima facie* case of discrimination has been established against the Respondents does not automatically entitle the complainant to relief. The burden shifts to the Respondents to establish that the impugned requirement was reasonable and *bona fide* in the circumstances. This requires the Respondents to demonstrate that Mr. Jeppesen could not be accommodated without undue hardship, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

The duty to accommodate, short of undue hardship, has been described in a number of judicial and administrative tribunal decisions. While not exhaustive, the following descriptions of this duty and how it is to be interpreted in individual cases have been of assistance to me:

(a) The prospective employer must establish that it was impossible to

reasonably accommodate, without incurring undue hardship. Further, the term "undue" implies that some hardship is acceptable. More than mere negligible or *de minimus* effort is required to satisfy the duty to accommodate: *Renaud, supra,* at p. 585.

(b) On the other hand, it is necessary to put some realistic limit upon the duty to accommodate. Taking reasonable steps to accommodate without undue hardship requires the employer to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer. The *Code* must be construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his or her business: *Ontario (Human Rights Commission) v. Simpsons Sears Ltd., supra*, at pp. 552-555.

(c) Where economic harm or risk to safety are alleged, proof must be concrete and not impressionistic. In some circumstances, excessive cost may justify a refusal to accommodate those with disabilities, but one must be wary of putting too low a value on accommodating the disabled. Impressionistic evidence of increased expense will not generally suffice: *Renaud, supra* at p. 585; *Grismer, supra* at pp. 891-892; *Koeppel v. Canada (Dept. of National Defence)* (1997), 32 C.H.R.R. D/107 (C.H.R.T.) at D/154.

(d) It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship: *Meiorin, supra* at p.35.

(e) Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. The possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical

when considering how this may best be done in particular circumstances: *Meiorin, supra* at p.35.

(f) Some of the important questions that may be asked in the course of this analysis that may have application to this proceeding include:

(i) Has the employer investigated alternative approaches that do not have a discriminatory effect?

(ii) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(iii) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose? (*Meiorin, supra,* at pp.36-37)

(g) If the *prima facie* discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose, or, to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR: *Meiorin, supra,* at p.37.

(h) Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible: *Meiorin, supra,* at p.38.

(i) In order to prove that its standard is reasonably necessary, the employer always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost: *Grismer, supra,* at pp.

885-887.

(j) There is a duty on the complainant to assist in securing an appropriate accommodation. To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered: *Renaud, supra,* at pp. 592-593.

Positions of the Parties

The Commission and Mr. Jeppesen submitted, *inter alia,* that the Respondents never considered alternative ways of fulfilling the full-time firefighters' position and, in particular, never considered Mr. Jeppesen's request to perform only firefighting and related duties. Their immediate rejection of his request for accommodation demonstrates that they failed in their duty to take reasonable steps to accommodate. In any event, the Respondents adduced no objective evidence of undue hardship. Instead, their evidence was impressionistic and speculative. In particular, the Respondents' evidence relating to daytime training of full-time firefighters failed to establish that all firefighters were needed to fill in for ambulance personnel to enable the latter to receive training.

The Respondents submitted, *inter alia,* that the duty to accommodate does not compel an employer to create an entirely new position, different from that posted. Where a substantial component of the employment duties relate to staffing the ambulance, it is unreasonable to require the employer to create a new position which has no ambulance component. There is no requirement that an employer hire two people to do the job of one in order to accommodate. Further, since the requirement was imposed by government, no accommodation was available to the Service. Put another way, a requirement imposed by government cannot be regarded as discrimination by the Respondents and must be regarded as a BFOR. In any event, the creation

of a new position would have resulted in undue hardship to the Service. It would have compromised the ability of those assigned to ambulance duty to receive proper training in fire suppression. As well, a firefighter assigned to the fire truck is often called upon to staff the ambulance to permit both ambulance assignees to work on the patient. These are health and safety issues.

The Material Time Frame for Evaluating the Respondents' Conduct

In order to address the merits of these respective positions, it is important to first resolve the conflicting submissions as to the material time frame for assessing whether the Respondents failed to accommodate Mr. Jeppesen, short of undue hardship.

The Commission submitted, *inter alia,* that undue hardship must be assessed "after January 5, 1998, the date Mr. Jeppesen would have commenced his full-time employment had his request for accommodation been accepted."

The Respondents submitted, *inter alia,* that the time frame relevant to this proceeding is November 1997, when the complainant first requested accommodation by the elimination of the class F licence as a requirement of employment. Accordingly, my evaluation of the Respondents' conduct must be based only upon the circumstances existing in November 1997 when accommodation was first sought. The Respondents further submitted that any argument referring to the "evolution of the Service into a full-time fire suppression service depends upon the benefit of hindsight and creates a 'moving target'". Amalgamation, which took place in 2000 was not seen as inevitable in 1997.

It is self-evident that the Respondents' conduct cannot be evaluated based upon circumstances that did not exist when Mr. Jeppesen was seeking accommodation. The

Respondents cannot be judged based upon hindsight. However, the Respondents' application of this principle to the case at hand was seriously flawed. Although Mr. Jeppesen first sought accommodation in November 1997, he continued to do so until late 1998 when he abandoned his request for employment. The resources available to the Service were significantly enhanced during this period. I find that this entire period is the material time frame for evaluating the Respondents' conduct.

An employer may be unable to accommodate a prospective employee short of undue hardship, given the costs, limited sources of funding or health and safety requirements existing when accommodation is sought. However, circumstances change. It would be inconsistent with the plain meaning and intent of sections 11(2) and 17(2) of the *Code* and with the tenor of human rights jurisprudence to fix employers or prospective employees with the circumstances existing when accommodation was first sought. An employer may adopt a standard or requirement that is reasonably necessary to the accomplishment of a legitimate work-related purpose but becomes unnecessary as circumstances change.[19] The equality rights recognized and protected by the *Code* would be seriously eroded if an employer were entitled to maintain a standard or requirement that is unnecessary to the fulfillment of any legitimate work-related purpose, and hence is discriminatory, because at one time, the standard or requirement was reasonably necessary. To state the obvious, such an approach would provide little incentive for employers to build conceptions of equality into workplace standards or to consider the unique capabilities and inherent worth and dignity of every individual, as circumstances change.

Counsel for the Respondents conceded in oral argument that the decision was made in November 1997 that Mr. Jeppesen could not be accommodated. Thereafter, it was decided to

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[19] It is also possible that an unjustified standard or requirement may become reasonably necessary to the accomplishment of a legitimate work-related purpose as circumstances change.

"maintain" or "adhere" to the position already taken. It was never considered whether the additional resources and scheduling modifications available in mid-1998 now permitted the Service to accommodate Mr. Jeppesen. This concession conformed to the evidence tendered by the Respondents' witnesses. They focussed, in large measure, on why Mr. Jeppesen could not be accommodated in 1997. Indeed, the opinions of Chief Guilbault, Deputy Chief Mehlenbacher and Captain Olivieri that 11 or 12 full-time firefighters were needed to ensure that the ambulance could be operated were highly relevant to whether Mr. Jeppesen could be accommodated without undue hardship in 1997 but in reality supported the complainant's position that he could be accommodated without undue hardship once 16 full-time firefighters were in place in 1998.

I will have more to say about the approach taken by the Respondents to the issue of accommodation later in these reasons. Suffice it to say here, I have considered the circumstances in existence *throughout* the time frame within which Mr. Jeppesen sought accommodation, in determining whether the Respondents demonstrated that the impugned requirement was a BFOR.

Some of the events which occurred after Mr. Jeppesen abandoned his request for accommodation do have relevance. After three new firefighters were hired in 1998, the Service moved to a "12 hour, 7 day a week" fire suppression schedule. This was accomplished with the same resources that were available to the Service when Mr. Jeppesen last sought accommodation. As well, I earlier found that during the time frame that Mr. Jeppesen sought accommodation, it was abundantly clear that the *firefighting* demands upon the Service compelled it to increase its contingent of full-time firefighters and move to a system that, in the least, had full-time firefighters on duty, dedicated to firefighting, during the days. It follows that the approach and revised scheduling adopted by the Service in October 1998 and continued at least through 1998 are relevant to whether Mr. Jeppesen could have been accommodated without undue hardship, had he been hired in 1998.

However, I have placed no reliance upon the evidence that amalgamation took place in 1999 and that the Service relinquished its ambulance related responsibilities in 2000. When Mr. Jeppesen sought accommodation, these events were not known or necessarily expected. Consideration of these events would amount to evaluating the Respondents' conduct in hindsight.

Relevance of a Government-Imposed Requirement

The Respondents submitted that a legal requirement imposed by a third party, the Government of Ontario, cannot be regarded as discrimination *by the Respondents* and must therefore be regarded as a BFOR. I briefly addressed this submission in the context of determining that the Respondents had *prima facie* discriminated against Mr. Jeppesen. The government did not impose a requirement that full-time firefighters must be legally qualified to operate an ambulance. It imposed a requirement that ambulance operators must possess a valid class F licence or its equivalent. It was the Respondents that imposed the requirement that all full-time firefighters must possess a valid class F licence or its equivalent in order to operate the ambulance. It was this requirement that resulted in Mr. Jeppesen's exclusion from employment based on his disability and was therefore discriminatory, unless it constituted a BFOR.

The Respondents also submitted that the fact that the government imposed the visual acuity requirement for class F licence applicants is relevant in another way to whether the Respondents failed in any duty to accommodate. It was argued that Mr. Jeppesen should have sought accommodation from the Government of Ontario, rather than from the Respondents. The Commission and Mr. Jeppesen submitted that, whether or not the government discriminated against Mr. Jeppesen, the Respondents had an obligation not to discriminate and that they were not relieved from their duty in this regard. They contended that it was irrelevant whether the government discriminated against Mr. Jeppesen or could have accommodated him.

In light of the recent decision of the Supreme Court of Canada in *Grismer, supra,* it is not

surprising that the Respondents invite consideration of this issue. In *Grismer,* the British Columbia Superintendent of Motor Vehicles cancelled the claimant's driver's licence. Due to an illness which eliminated most of the claimant's peripheral vision on the left side of both eyes, the claimant's vision did not meet the standards set by the Superintendent for safe driving, requiring a minimum of a 120 degree field of vision. Although certain exceptions were permitted to this standard, people with the claimant's illness never met the vision standard and were never permitted to drive. The restriction was applied absolutely, permitting no exceptions or individual assessments. Although the claimant was found by his driving examiner to compensate well for his loss of peripheral vision and passed the standard visual test and driving test, he was repeatedly denied a licence. The question that made its way to the Supreme Court of Canada was whether, applying the *Meiorin* test earlier articulated, an absolute prohibition on licensing people with the claimant's illness and a less than 120 degree field of vision, without the possibility of individual assessment, constituted discrimination.

The Superintendent was required to show that he could not meet his goal of maintaining highway safety while accommodating persons like Mr. Grismer, without incurring undue hardship. The Court concluded that the Superintendent had failed to show that no one with Mr. Grismer's condition could ever drive with a reasonable level of safety and failed to show that the risk or costs associated with providing individual assessments constituted undue hardship. Thus, the discrimination was not in the refusal to issue Mr. Grismer a licence but in the refusal to give him a chance to prove through an individual assessment that he could be licenced without jeopardizing the goal of reasonable road safety.

It is clear that the regulations to the *Highway Traffic Act* do not permit the Government of Ontario to waive the visual acuity requirement imposed for applicants for class F licences such as Mr. Jeppesen. No individual assessments are made or permitted. Accordingly, there are certain parallels between the *Grismer* decision and Mr. Jeppesen's situation. However, I am not in a

position to conclude that the Ontario government's legislative regime discriminates against persons such as Mr. Jeppesen.

Firstly, no request was made to add the Government of Ontario as a party to this proceeding, nor was I prepared to do so on my initiative in the middle of the proceeding. Such an approach would have been questionable, since no formal request was ever made of the government to accommodate Mr. Jeppesen. To state the obvious, the government has had no opportunity to demonstrate, if it can, that there are reasons why the waiver program cannot be extended to class F licence applicants without undue hardship.

Secondly, *Grismer* may support the position that the Government of Ontario is obligated to individually assess applicants for class F licences who seek accommodation due to visual acuity disabilities. However, it may not be determinative. The regulations to the *Highway Traffic Act* specifically state that the visual acuity qualifications required of an applicant for a class F licence[20] apply despite the *Code*. Having noted that, the effect of this provision would no doubt be the subject of legal debate and potentially the subject of litigation under the *Canadian Charter of Rights and Freedoms*.[21]

Finally, even *Grismer* ends with this caution at p.894:

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[20]As well as applicants for other classes of licence or holders of such licences.

[21]One issue that arises is whether the provision that states that visual acuity requirements apply despite the *Code* prevents an attack mounted not to the visual acuity requirements themselves but to the separate provision that excludes applicants for some classes of licences who fail to meet those visual acuity requirements from the waiver program. Section 47(2) of the *Code* confers primacy of the *Code* over other Acts or regulations, unless the latter *specifically* provide that they apply, despite the *Code*.

> "Nor should this decision be taken as predetermining the result in other cases. This appeal is essentially a judicial review of a decision of a human rights tribunal in a particular case. The result flows from the evidence called before and accepted by the Member in this case. The Member found that the Superintendent had not met the burden of proving that a blanket refusal without the possibility of individual accommodation was reasonably necessary under the Act. In another case, on other evidence, the burden might be met."

Even if I could conclude that the Government of Ontario would have been compelled to individually assess Mr. Jeppesen to determine if he could drive class F vehicles safely, and that he would have passed such an assessment, it would not have affected the disposition in this case. As earlier noted, concomitant with a search for reasonable accommodation is a complainant's duty to facilitate that search. In some circumstances, the failure to facilitate the search for accommodation may be relevant to whether the employer breached its own duty. For example, if the Service had required only that Mr. Jeppesen obtain a class A licence to operate the fire trucks and Mr. Jeppesen had declined to apply for an available waiver, he would have been hard pressed to successfully challenge the fire department's requirement that all applicants possess a class A licence. The Service would have fulfilled its duty to accommodate by permitting Mr. Jeppesen to seek a waiver while the position remained open.[22]

However, in this case, I am satisfied that Mr. Jeppesen's failure to formally seek accommodation from the government did not represent a breach of any duty on his part or affect the Respondents' own duty to accommodate him, short of undue hardship. Mr. Jeppesen's

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[22]Interestingly, the Respondents submitted that they *did* accommodate Mr. Jeppesen by deferring the decision to hire until he had more fully pursued the class F licence issue. However, if the Respondents could accommodate Mr. Jeppesen by hiring him to perform firefighting or related duties only, without incurring undue hardship, a deferral to await confirmation that a waiver was unavailable could not fulfil the duty to accommodate.

preference for seeking accommodation from his employer was reasonable in all the circumstances. He took active steps to ascertain whether the government could waive the visual acuity requirements for a class F licence. He correctly apprehended that accommodation from the government required legislative intervention. Further, the Supreme Court of Canada had not decided the *Grismer* case when Mr. Jeppesen was seeking accommodation. On the contrary, the British Columbia Court of Appeal's 1997 judgment had set aside the original decision favouring the claimant. As I noted above, even the Supreme Court of Canada's decision in *Grismer* may not have been determinative in favour of Mr. Jeppesen's position. In short, it would not have been self-evident (whether to Mr. Jeppesen or others) that seeking accommodation from the government would have been successful and, if successful, more timely than seeking accommodation from the Respondents.[23]

Ultimately, of course, the law is clear that it is not a defence to a claim of discrimination that parties other than the employer also discriminated against the claimant. I conclude that this is not one of those cases in which a claimant's failure to formally seek accommodation prevents him or her from obtaining relief or otherwise affects the assessment of whether the Respondents discriminated against the claimant.

The Nature of the Job Applied For

To determine whether the impugned requirement was a BFOR, it is necessary to consider in greater detail the nature of the positions offered by the Respondents in November 1997 and July 1998.

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[23]This is not to say that Mr. Jeppesen could not have sought accommodation both from the Respondents and from the Government of Ontario. This is only to say that his decision was reasonable and did not represent a breach of any duty on his part that would affect the Respondents' own duty.

Mr. Jeppesen first applied for a full-time position in June 1997. Although discrimination is not alleged arising out of the Respondents' failure to hire Mr. Jeppesen in June 1997, it is instructive to consider the nature of the position that Mr. Jeppesen applied for at that time. After all, the hiring eligibility list created as a result of the June 1997 competition determined who was hired in November 1997. Further, the posting in July 1998 was almost identical to the June 1997 posting.

The evidence is overwhelming that in June 1997 and thereafter, Mr. Jeppesen was applying for a position as a full-time firefighter, and not an ambulance operator. In this regard, it is instructive to examine the June 2, 1997 posting in some detail:

(a) it reflected that the Town of Ancaster Fire Department required "two full-time firefighters." (The July 1998 posting reflected that the Fire and Emergency Services Department required "three full-time firefighters.")

(b) the general duties, as a member of a platoon, were to respond to fire alarms, lay and connect hose, hold nozzles and direct water streams, raise and climb ladders, use chemical extinguishers, bars, hooks, lines and other equipment, ventilate fire to release heat and smoke, place salvage covers to prevent water damage, administer first aid, drive and operate firefighting and emergency equipment, perform maintenance tasks on apparatus, equipment and fire station, perform inspections and clerical duties when assigned to fire prevention work, under the direction of a superior, have an interest and willingness to assist in community efforts, and, perform additional tasks and related work as assigned e.g. ambulance duties.

The general duties enumerated in the posting were heavily weighted in favour of firefighting duties. Ambulance duties were provided as an example of additional and related work. (The July 13, 1998 posting only added preventing fire from rekindling and performing rescues.)

(c) similarly, the specified qualifications were heavily weighted towards firefighting and related duties: be of a physical stature, with weight proportionate to height and be able to work under arduous physical conditions as part of an active firefighting and rescue team; possess a valid and subsisting class G driver's licence and possess or be able to qualify for the "D/Z endorsement-air brakes"; knowledge of the operation of apparatus and equipment and methods used in combatting, extinguishing and preventing fires and in rescue work; thorough knowledge of rules and regulations of the Fire Department; considerable knowledge of the maintenance of equipment; knowledge of building construction and related codes, hydraulics and the location of hazardous occupancies in the municipality. Additional qualifications, such as education, legal entitlement to work in Canada and C.P.R./First Aid Certification were qualifications that could have equal application to a firefighter or ambulance attendant.

The qualifications did specifically require a valid and subsisting class F licence to operate the ambulance and conformity with the *Ambulance Act*'s requirements (such as the absence of driving prohibitions, a criminal record or significant driver's record; English fluency and qualification or eligibility to qualify as an emergency medical care assistant).

(d) the salary was that of a "probationary firefighter."

(e) the applications were to be forwarded to "*Fire Chief* Dave Guilbault."

The hiring process was also instructive. It involved:

(g) a written examination designed by a California consulting firm specifically for firefighters.

(h) physical agility tests specifically designed for firefighting (e.g. ladder climb 35' and 75', hose dragging).

(i) Canadian Standard of Fitness Testing for aerobic fitness, muscular strength, flexibility and muscular endurance.

The required levels of fitness were obviously representative of the fitness thought to be required to be a firefighter.

(j) a medical examination by a medical practitioner designated by the fire department.

(k) an interview and written submissions. The 1997 instructions for written submissions directed applicants to outline a fire safety education program that could be used for seniors and children.

The posting, duties and qualifications and hiring protocols made crystal clear that applicants were being evaluated for employment as full-time firefighters. Their ambulance duties were additional. The hiring process was not designed to test for skills in operating an ambulance.[24]

Interestingly, although this was an internal competition open to any employee of the Town of Ancaster, only part-time firefighters for the town applied. Mr. Pinelli suggested that they, and Mr. Jeppesen, were fully aware that the position required the successful applicant to perform ambulance duties. Their knowledge has limited relevance here. The need to perform ambulance duties was no impediment to the other applicants. Mr. Jeppesen's knowledge that the job required him to perform ambulance duties is hardly determinative. Otherwise, as counsel for the Commission noted, a complainant would be prevented from redressing discrimination where the discrimination is known to him or her.

Although unnecessary to my decision, I note that the fact that only part-time firefighters with the town applied may, however, signal that the posting clearly was directed to prospective firefighters and responded to in kind.

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[24]In fairness, some of the hiring criteria could, incidentally, assist in determining whether an applicant would be a competent ambulance operator.

Once hired, full-time employees received additional training and certification to perform ambulance duties. In theory, a successful applicant could have later proven to be a poor ambulance operator because the testing and qualifications were generally not directed to establishing in advance that the applicant was the very best ambulance operator of the persons who sought employment.

Counsel for the Respondents submitted that the reality of the job, rather than the posting, should be looked to. Several witnesses testified that the Service was seeking out and hiring ambulance operators. This characterization is not only inconsistent with the posting but with the practice.

Employees of the Service regarded themselves as "firefighters" and so described themselves. They sought coveted employment with the Service, even with knowledge of additional ambulance duties, because they wanted to be firefighters. Full-time firefighters, once hired, became members of the Ancaster Professional Fire Fighters' Association Local 2592 I.A.F.F. The collective agreement operative for the years 1998 to 2000 (though formally signed in September, 1999) outlines the privileges, working conditions and remuneration of "full-time professional firefighters." These individuals are defined as persons continuously employed by the Town of Ancaster as firefighters on a full-time basis, excluding the Fire Chief and Deputy Fire Chief. Clause 9.1 provides:

> Hours of work for a firefighter assigned to ambulance duty shall be tour of duty of 10 hour day shifts or 14 hour night shifts averaging 42 hours per tour over a year. Hours of work for a firefighter assigned to fire and emergency duty consists of a tour of duty of 12 hour shifts equaling 48 hours averaging 42 hours per tour over a year or a tour of duty of 8 hour shifts equaling 40 hours. Yearly work schedules shall be posted by December 1st prior to the year of implementation.

The Service is organized into traditional firefighter ranks from Chief, Deputy Chief, Captain and Lieutenant to 1st, 2nd, 3rd, 4th class and probationary firefighters.

The collective agreement reflects that yearly work schedules shall be posted by December 1st prior to the year of implementation. The evidence established that the preset schedules may, of course, be varied, depending upon any number of circumstances, including hirings or resignations during the year.

The shift schedule for 1998 is also revealing. It shows that newly hired firefighters became additional floaters. They did not become one of the eight firefighters dedicated to the ambulance. The same eight firefighters remained assigned to ambulance duty for the entire year. In other words, had Mr. Jeppesen been hired for any of the seven new positions he sought employment for, he would have been designated as a floater and remain a floater for an extended period of time.

Finally, I note Mr. Jeppesen's evidence, which I accept, that Chief Guilbault told him that the November 1997 hiring was groundbreaking for the Town of Ancaster as this was the first time that firefighters were being hired to cover firefighting duties, rather than cover the ambulance. Thus, even if one were to characterize the June 1997 hiring differently than I have done, even Chief Guilbault recognized that the November 1997 hiring represented a shift of priorities.

On the totality of the evidence, I find that the positions which Mr. Jeppesen applied and sought accommodation for were full-time firefighters' positions with additional duties as ambulance operators, as may have been assigned. Accordingly, it would be incorrect to frame the issue here as whether the impugned requirement discriminated against an applicant for employment as an ambulance operator. Instead, I must consider whether the requirement that all full-time firefighters possess a class F licence or its equivalent in order to operate the ambulance constituted a BFOR.

Application of the *Meiorin* Test

The "unified test", earlier outlined in these reasons, bears repetition here. In order to establish a BFOR, the Respondents were required to establish on the balance of probabilities:

> (a) that the employer adopted the requirement for a purpose rationally connected to the performance of the job;
>
> (b) that the employer adopted the particular requirement in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (c) that the requirement is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the requirement is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

The Commission conceded that the first two elements had been fulfilled. I agree. The requirement that successful applicants be legally qualified to operate an ambulance was rationally connected to the performance of the job, which included the performance by firefighters of ambulance duties. Further, the requirement was adopted honestly and with the good faith belief that it was necessary to the fulfillment of a legitimate work-related purpose.

It was the third element that was in dispute. For reasons that follow, the Respondents were unable to establish that the requirement that all firefighters be legally qualified to operate an ambulance was reasonably necessary to the fulfilment of the Town of Ancaster's Fire and Emergency Service. Indeed, they fell far short of demonstrating that they were unable to accommodate Jeppesen without incurring undue hardship.

Mr. Jeppesen was seeking employment as a full-time firefighter. His disability did not affect, even to the slightest degree, his ability to perform all of the duties associated with firefighting and

fire prevention. Indeed, when he sought accommodation, he had already been evaluated by the Respondents to be the best of the applicants for full-time employment through the hiring process initiated in June 1997. The Respondents conceded that his legal inability to operate an ambulance represented the only reason for not hiring him.

Mr. Jeppesen's first request for accommodation was formalized in writing on November 20, 1997. The Commission pointed out that it was refused that same day, citing *Marzano* v. *Nathar Ltd.* (1992), 18 C.H.R.R. D/248 (Ont. Bd. of Inquiry) at D/252:

> "If an employer simply rejects a request for accommodation out of hand, without giving the matter adequate thought and attention, including a thorough exploration of the possibilities, it can hardly be said to have taken adequate steps to accommodate."

As I earlier stated, I did not infer from the timing of Chief Guilbault's written response alone that the Service simply rejected the request out of hand. I accept that the Service considered the matter before the formal request for accommodation was received and further explored the matter after November 20, 1997. However, I do find that the Service, based upon an erroneous view of its duty to accommodate, failed to direct itself to the appropriate considerations in determining whether Mr. Jeppesen could be accommodated.

When Mr. Jeppesen first sought accommodation, little if any consideration was given to whether he could be assigned firefighting or related duties only, given the human resources then available to the Service, without incurring undue hardship. There is no concrete evidence that anyone truly examined *at that time* how such an assignment would specifically affect the availability of sufficient floaters to substitute for ambulance personnel or the ability to train firefighters dedicated to the ambulance. Similarly, there is no concrete evidence that anyone reviewed the Service's shift schedule or explored any alternative scheduling to accommodate Mr. Jeppesen. Indeed, there is no persuasive evidence that anyone specifically considered whether

the hiring of two new firefighters affected the Service's ability to accommodate Mr. Jeppesen. Instead, it was felt that no accommodation was possible as long as the Service performed ambulance related duties. The requirement that Mr. Jeppesen retain his class F licence was regarded as a legal impediment to hiring Mr. Jeppesen. The analysis now advanced as to why it would have constituted undue hardship to permit Mr. Jeppesen to perform firefighting or related duties only is largely *ex post facto.*

More important, the Respondents gave no fresh consideration whatsoever to the issue of accommodation when they were able to hire three more firefighters in mid-1998. The Respondents conceded that the circumstances which existed when Mr. Jeppesen first sought accommodation were regarded by them to be controlling. They were "maintaining" or "adhering" to the earlier decision. It was never considered whether the additional resources and scheduling modifications available in mid-1998 now permitted the Service to accommodate Mr. Jeppesen. This constituted a significant misunderstanding of the duty to accommodate.

As a result, I am satisfied that no appropriate consideration was ever given to whether the Service could accommodate Mr. Jeppesen by hiring him to perform firefighting or related duties only, without incurring undue hardship.

The issue of accommodation involves both a procedural and a substantive component. The Respondents' failure to properly consider the issue of accommodation implicates their *procedural* approach to that issue. It may be argued that an employer's failure to properly explore the issue of accommodation, regardless of whether accommodation short of undue hardship could have been made, should be determinative: see M. David Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1992) Canadian Labour Law Journal (No. 1) at pp. 13-14.

Another approach regards the failure by an employer to properly consider the issue as

relevant, but not determinative. Put simply, an employer may, in theory, be able to demonstrate, even through *ex post facto* analysis, that accommodation without undue hardship was not possible, even though it failed to properly consider the issue at the time. On this approach, an employer's failure to consider any accommodating measures at all may be regarded as *evidence* of a failure to meet the duty to accommodate: *Marzano v. Nathar Ltd., supra,* at D/252.

I have adapted the latter approach. In taking that approach, I have proceeded in accordance with the suggestion made by the Supreme Court of Canada in *Meiorin* (at p. 38):

> "Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, *supra.*"

Turning to the substantive issue which presents itself here, I find that Mr. Jeppesen could have been accommodated, short of undue hardship, by permitting him to perform firefighting and related duties only. In support of this conclusion, I rely, *inter alia*, upon the following evidence and findings of fact, some of which have been referred to earlier:

(a) In late 1997 and in 1998, the Service was hiring full-time firefighters, not ambulance operators. The operation of the ambulance constituted additional, rather than the primary, duties of the newly hired firefighters.

(b) New full-time firefighters who commenced employment in 1998 were to be floaters for the balance of 1998 and for some time thereafter. There was nothing that compelled the Service to designate all of these firefighters as employees dedicated only to the ambulance. Indeed, it was preferable that the more senior employees remain dedicated to the ambulance.

(c) By the fall of 1998, there were 8 floaters available to the Service.

(d) In October 1998, with the addition of three new firefighters, the

Service was able to move to what the Respondents described as a "12 hour, 7 day a week fire coverage." This was designed to enhance the fire service by having a crew of full-time firefighters (other than those dedicated to the ambulance) on duty for 12 hours every day. During the time frame that Mr. Jeppesen sought accommodation, it became abundantly clear that the firefighting demands upon the Service compelled it to increase its contingent of full-time firefighters and move to a system that, in the least, had full-time firefighters on duty, dedicated to firefighting, during the days.

(e) The Service looked forward to further enhancing the fire service by having a crew of full-time firefighters (again, other than those dedicated to the ambulance) on duty 24 hours every day. When Mr. Jeppesen sought accommodation, the Service was already moving in this direction, which both David Guilbault and Mark Mehlenbacher regarded as important to the success of the fire suppression component of the Service and, particularly, to the timeliness of the Service's response to fire calls.

(f) There was no persuasive evidence that all of the full-time firefighters hired in 1998 were required to be available to substitute for employees dedicated to the ambulance. Indeed, the available evidence suggested the contrary.

(g) From January 5, 1998 to December 31, 1998, there were two or more floaters in the station who were not scheduled to substitute for ambulance personnel on 96.5% of the day shifts. There were sufficient numbers of floaters, certainly by the fall of 1998, to ensure that *one* of the floaters could be dedicated to firefighting or related duties.[25]

(h) The evidence from the Respondents' own witnesses supported, at the highest, the position that 12 full-time firefighters were needed to adequately staff the ambulance service. I find that the greater number of firefighters available by the fall of 1998 meant that at least one firefighter could be accommodated without undue

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[25]This was so, even recognizing that sometimes, an officer or acting officer was on duty as one of the floaters.

hardship by assignment to firefighting duties only.

(i) Not one witness tendered by the Respondent specifically said that it would have been impossible to reasonably accommodate Mr. Jeppesen short of undue hardship by the fall of 1998. Mehlenbacher said that it would have been "difficult" to do so. Of course, the duty to accommodate short of undue hardship implies that fulfillment of the duty to accommodate may involve some hardship.

(j) As I previously noted, there was no concrete evidence that anyone, at the material time, considered whether the existing or a modified schedule could accommodate one firefighter assigned to firefighting duties only. Deputy Chief Mielenbacher and others made clear that the schedule (designed by a former deputy chief) did not represent the only way to schedule firefighters. Indeed, the scheduling process has undergone significant changes since its inception.

The Respondents submitted that in 1998, all floaters were required to substitute for ambulance assignees to enable those ambulance assignees to receive daily training. The Commission submitted that the Respondents' evidence in this regard was impressionistic and speculative. It noted, *inter alia,* the following:

(a) on 96.5% of the day shifts during 1998, there were two or more floaters in the station not scheduled to fill in on the ambulance. Had Mr. Jeppesen been one of these floaters, there still would have been one firefighter available to fill in for the ambulance on an *ad hoc* basis; and,

(b) the Ancaster Fire Department never considered other ways to accomplish daytime training such as rotating all firefighters through a firefighting crew. Small crews of firefighters were available during the day shifts throughout1998.

The evidence tendered by the Respondents relating to firefighting training was of limited value. It did demonstrate that daytime training was best done in teams and that the need for firefighters to respond to either fire or ambulance calls meant that uninterrupted training was inherently difficult. It also demonstrated that in 1997, training was more problematic for

ambulance assignees since they could not easily be rotated off the ambulance. However, the evidence became more impressionistic and vague as the witnesses described the level of difficulty experienced once five new firefighters were incorporated into the work force. These new firefighters did not entirely remove any difficulties associated with daytime training. However, it is clear that they significantly enhanced the ability of the Service to train its firefighters, including those who staffed the ambulance. It is also clear that no analysis was undertaken by the Respondents as to the effect, if any, that accommodating Mr. Jeppesen alone would have on training the firefighters staffing the ambulance.

There is no concrete evidence that the Respondents gave any consideration to how training could be effected, or even enhanced, through Mr. Jeppesen's employment. In particular, there was no concrete evidence that, once the number of floaters rose to eight, Mr. Jeppesen's inability to substitute for ambulance personnel would have amounted to an insurmountable hurdle, or indeed, to any real difficulty. Frankly, it appeared that a more systematic approach to training was needed and that the any training difficulties still experienced in late 1998 were unlikely to be compounded in any significant way by Mr. Jeppesen's employment.

Mr. Jeppesen, as a part-time firefighter for almost a decade, had been a member of the Service's training committee. In requesting accommodation, he was prepared to work with management and the union to constructively address any problems that accommodation might create. He suggested that he could assist the Fire and Life Safety Officer with his duties, and assist in augmenting public education. He might also have been well positioned to facilitate and advance the training program. None of these alternatives were explored.

My findings make it unnecessary to determine whether, as the Commission alleged, the evidence also failed to demonstrate that reasonable alternatives to daytime training did not exist.

Other safety issues were raised by the Respondents. For example, there was evidence that

floaters were sometimes required to fill in for ambulance assignees after a traumatic ambulance call. This might happen six times or so, a year. Sometimes, floaters also relieved ambulance assignees during the latter part of their 10 hour day shift. There was no evidence whatsoever that it was necessary that every floater be able to operate the ambulance to address these needs. Indeed, during the 14 hour night shift, ambulance assignees had no available floaters whatsoever to spell them.

Similarly, I was told that there have been occasions where it was necessary for a firefighter not assigned to ambulance duties to drive the ambulance at a fire scene. Both ambulance assignees were otherwise engaged in emergency care. There was no evidence as to how frequently this occurred. More important, the evidence was that almost invariably, at least four firefighters per truck were dispatched to a fire scene. There was no suggestion that there had ever been a situation where every firefighter at the fire scene had to be able to operate an ambulance. It should be remembered that part-time firefighters are also at a fire scene. There was no suggestion that it was necessary that these firefighters have a class F licence or indeed, whether they generally did or did not. Surely, the Service could have both accommodated Mr. Jeppesen and ensured that at least one or two firefighters dispatched to the scene had a class F licence, if this were truly necessary.

There was evidence that, on occasion, officers had to staff the ambulance, due to shortages in personnel. This was particularly so before additional firefighters were hired in late 1997 and in 1998. These shortages were further alleviated once the hiring of new firefighters allowed the other firefighters to catch up on accumulated holidays or leave days. That is not to say that officers never staffed the ambulance in the latter part of 1998. The evidence in this regard was vague. The evidence fell far short of demonstrating that accommodating Mr. Jeppesen would have resulted in undue hardship.

The Respondents also submitted that permitting Mr. Jeppesen to perform only firefighting or

related duties would have created a new position different from the one posted and prioritized by the Service. They argued that the *Code* does not require this. Further, they submitted that accommodation would have compelled the Service to hire another employee or incur additional costs to ensure that the desired work was performed.

For the reasons already given, I am unconvinced that accommodating Mr. Jeppesen would have required the Service to hire another employee or incur additional costs to ensure that the ambulance was staffed and its assignees trained. The evidence did not support this position. Further, even if the Service were required to incur some additional costs, there was no demonstration that these costs were excessive to the point of creating an undue hardship. I am equally unconvinced that accommodating Mr. Jeppesen would have created a different position that the one posted and prioritized by the Respondents. In this regard, I have carefully examined the nature and structure of the Service when Mr. Jeppesen sought accommodation, and its true priorities and resources.

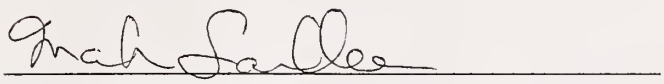
It is all too easy to characterize the modification of an employee's job description or of inflexible requirements of employment as the creation of a new and different position. The reality here is that accommodating Mr. Jeppesen would have enabled him to do the job in a way that accomplished the Service's legitimate purposes. It was unnecessary that all of the Service's full-time firefighters adhere to the same standards to accomplish the legitimate purpose of the Service.

CONCLUSION

For these reasons, I find that the requirement that all full-time firefighters be legally qualified to operate an ambulance by retaining a class F licence or its equivalent was discriminatory. The Respondents discriminated against Mr. Jeppesen on the basis of disability. They failed to accommodate him, when they were able to do so without incurring undue hardship. They thereby infringed his rights under the *Code.*

The Deputy Registrar will contact the parties and the Association to schedule a hearing date to address the issue of remedy. Counsel for both parties are to be commended for their skillful and fair presentation of the case.

Dated at Toronto, Ontario, this 2nd day of January, 2001



Mark Sandler, Member